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In the
Supreme Court of the United States

OCTOBER TERM, 1966

No. 542

E. W. WIGGINS AIRWAYS, INC.,
PETITIONER,

v.

MASSACHUSETTS PORT AUTHORITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE MASSACHUSETTS PORT AUTHORITY IN OPPOSITION

Question Presented

Whether an agency of a state, which owns and operates a public airport in the performance of the State's governmental function, violates Sections 1 or 2 of the Sherman Act by arranging to have fixed base services conducted thereon by a single operator.

Statement

The original complaint in this action, charging that defendant Butler Aviation-Boston, Inc. (Butler-Boston) had conspired and combined to restrain and monopolize "fixed base" operations at Logan International Airport in East Boston, Massachusetts, was filed in March, 1963 (Pet. 4; R. 1).[1] The parties then engaged in discovery proceedings through the production of documents and interrogatories (R. 3-4). In April, 1965, two years after the action had been begun, an amended complaint was filed (R. 25), and an additional party defendant, Butler Company, the parent of defendant Butler-Boston, was added (R. 3, 41-43). Motions by the defendants to dismiss the amended complaint (R. 4, 43-44) were granted (Pet. 4; R. 2, 46) and the judgment of dismissal was affirmed (Pet. 4; Appendix A, 8a).

The essential allegations of the amended complaint are as follows:

Plaintiff, E. W. Wiggins Airways, Inc. (hereinafter referred to as "Wiggins"), and Van Dusen Aircraft Supplies of New England, Inc. (hereinafter referred to as "Van Dusen") had been engaged in conducting so-called "fixed base operations" at Logan International Airport in East Boston, Massachusetts (R. 8, ¶ 11). That airport had been managed and controlled originally by the City of Boston (R. 7; ¶ 10); thereafter by the Department of Public Works of the Commonwealth of Massachusetts (R. 7; ¶ 10); and then by the State Airport Management Board, an agency of the Commonwealth (R. 8, ¶ 12). In February, 1959, ownership of the airport, and its operation, control and management, were vested in the Massachusetts Port Authority (hereinafter referred to as the "Authority") under the provisions of St. 1956, c. 465 (R. 6,

[1] References indicated "R." are to petitioner's record appendix. References to the amended complaint are to the page of the record appendix followed by the paragraph of the complaint—*e.g.* "R. 8, ¶ 12".

¶ 3; R. 7, ¶ 10), (hereinafter referred to as the "Enabling Act").

Wiggins had a three-year lease from the State Airport Management Board to conduct fixed base operations which was due to expire on December 31, 1959 (R. 8, ¶ 12). Van Dusen's similar lease was to expire on December 31, 1961 (R. 8, ¶ 12). After taking over control of the airport, the Authority notified Wiggins that its lease would not be renewed but that it might continue as tenant-at-will on a month-to-month basis (R. 9, ¶ 15) and Wiggins did so continue for the next sixteen months (R. 13, § 32).

In early 1960, the Authority entered into a "conspiracy" with defendant Butler Company to make Butler the sole fixed-base operator at Logan (R. 10-11, ¶ 21). In January, 1961, the Authority advised Wiggins that it deemed it necessary that the facility be operated by one operator but that it might negotiate with one or more operators before selecting a firm (R. 11, ¶ 25). In February, 1961, it notified Wiggins that it had selected Butler (R. 12, § 26) and that Wiggins was to vacate the premises in ninety days (R. 12, ¶ 26). Wiggins left the airport in April, 1961 (R. 13, ¶ 32), after selling its business and property to Butler (R. 12, ¶ 29).

In May, 1961, defendant Butler-Boston was incorporated as a subsidiary of Butler Company (R. 13, ¶ 31) and in September the Authority entered into a lease with Butler-Boston under which Butler-Boston was to become the sole fixed base operator (R. 14, ¶ 33). As a result of a complaint filed with the Federal Aviation Agency by Wiggins and Van Dusen, the Administrator of the FAA in February, 1962, directed the Authority to extend Van Dusen's lease and to negotiate with all interested parties (R. 14, ¶ 34). By that time, Wiggins was no longer at the airport, having left a year before (R. 12-13, ¶ 29; R. 13, ¶ 32). Van Dusen, however, still continued its operations (R. 15-16, ¶ 39). Thus,

whereas prior to 1961 the two fixed base operators were Van Dusen and Wiggins, thereafter they were Van Dusen and Butler-Boston.

The amended complaint charges that the effect of the Authority's action was to "limit or foreclose competition" in the conduct of fixed base operations at Logan and to deprive the public of the benefits "derived from unrestrained competition" among fixed base operators (R. 15, ¶ 38) and that "based upon the foregoing", the defendants had conspired to restrain and monopolize, and attempted to monopolize, the business of fixed base operations at Logan in violation of Sections 1 and 2 of the Sherman Act (R. 16, ¶ 40, 41).

The court below held that the only conspiracy alleged was "a simple agreement or arrangement" (Pet. 7a) by the Authority to designate Butler as the sole fixed-base operator at Logan; that in deciding that it was necessary to have only one such operator and in entering into that arrangement, the Authority acted as an agency of the Commonwealth of Massachusetts, pursuant to its statutory duty to operate the airport and to establish regulations for its use (Pet. 6a); that, as this Court and other Federal courts have consistently held, action by the Authority in the exercise of a valid governmental function did not violate the Sherman Act (Pet. 6a-7a); and that, in any event, the exclusive arrangement was not in itself illegal (Pet. 7a-8a). Accordingly, it agreed with the District Court that on its face the amended complaint did not state a claim on which relief could be granted (Pet. 8a).

Argument

Far from involving an "important and novel question" (Pet. 8), this case is merely an example of the well-settled principle that "where a restraint upon trade or monopo-

lization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out". *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136. That rule has been consistently applied.[2] The holding of the court below is in full accord with the authorities and does not conflict with any applicable decision of this Court or of any Court of Appeals.

Petitioner distorts the issue involved in stating that the Authority "is not subject to supervision by the state" (Pet. 1) that its "activities are not directed by the state" (Pet. 9) and that it "is acting in a proprietary capacity" (Pet. 2). These assertions are unfounded. The Authority is not identical with the Commonwealth of Massachusetts, of course; nor is it one of the established executive departments of the Commonwealth. But, as the court below held, in taking the action complained of, it acted as an

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[2] *United Mine Workers of America* v. *Pennington*, 381 U.S. 657, 671 (United States Secretary of Labor); *Parker* v. *Brown*, 317 U.S. 341, 350, 352 (California Director of Agriculture and members of the State Agricultural Prorate Advisory Commission); *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533, 557-560 (United States Secretary of Agriculture and producer associations); *Floyd* v. *Gage*, 192 F. 2d 137 (4th Cir.) (State Banking Commission); *Miley* v. *John Hancock Mutual Life Insurance Company*, 148 F. Supp. 299 (D. Mass.) *aff'd* 242 F. 2d 758 (1st Cir.), *cert. denied* 355 U.S. 828 (Massachusetts State Employees Group Insurance Commission); *Allstate Insurance Co.* v. *Lanier*, 242 F. Supp. 73 (D.N.C.), *aff'd* 361 F. 2d 873 (4th Cir.) (State Insurance Commissioner); *Brechtel* v. *Board of Examiners of Bar Pilots for the Port of New Orleans*, 230 F. Supp. 18 (E.D. La.) (State boards and commissions relating to licensing of pilots); *Stroud* v. *Benson*, 155 F. Supp. 482 (E.D. N.C.), *vacated and dismissed for lack of jurisdiction*, 254 F. 2d 448 (4th Cir.) (contracts between State cooperative and warehousemen pursuant to regulations of Secretary of Agriculture); *Hitchcock* v. *Collenberg*, 140 F. Supp. 894 (D. Md.) *aff'd* 353 U.S. 919 (1957) (State Board of Medical Examiners); *United States* v. *Yellow Cab Co.*, 69 F. Supp. 170 (N.D. Ill.), *rev'd on other grounds*, 332 U.S. 218 (issuance of taxicab licenses by city); *Lowenstein* v. *Evans*, 69 Fed. 908 (C.C.S.C.) (state liquor monopoly).

agency of the Commonwealth, pursuant to legislative mandate, in the performance of a governmental function of the Commonwealth (Pet. Appendix A, 6a).

The Authority was created in 1956 to take over the operation, maintenance and development of several public projects—*i.e.*, port facilities in the port of Boston, a toll bridge (Mystic River Bridge) and two public airports (Logan International Airport and Hanscom Field)—all of which had theretofore been operated through other departments, boards, commissions or agencies of the Commonwealth.[3] The construction, operation and development of such projects have long been recognized as functions of government.[4] To perform these functions of the Commonwealth, the Authority was created, by Section 2 of the Enabling

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[3] As to the properties in the *Port of Boston*, see St. 1911, c. 748 (Directors of the Port of Boston); St. 1945, c. 619 (Port of Boston Authority); and St. 1953, c. 608 (Port of Boston Commission). As to the *Mystic River Bridge*, see St. 1946, c. 562, as amended by St. 1947, c. 626, and St. 1954, c. 432 (Mystic River Bridge Authority). As to *Logan Airport*, see St. 1928, c. 246 (Massachusetts Department of Public Works); Res. 1928, c. 64, and Res. 1930, c. 53 (City of Boston); Res. 1941, c. 8 and St. 1941, c. 695 (Massachusetts Department of Public Works); and St. 1948, c. 637 (State Airport Management Board and Commissioner of Airport Management). As to *Hanscom Field*, see St. 1939, c. 393 (Massachusetts Aeronautics Commission); and St. 1948, c. 637, and St. 1955, c. 769 (State Airport Management Board and Commissioner of Airport Management). (The Commissioner "was, in effect, replaced by the Authority which assumed his duties". *McGrath* v. *Massachusetts Port Authority*, Mass. Adv. Sh. (1966) 84, 213 N.E. 2d 397.) Every one of the essential powers now entrusted to the Massachusetts Port Authority by the Enabling Act is found in one or more of the statutes cited above.

[4] See, *e.g.*, as to bridges: *Kansas City Bridge Co.* v. *Alabama State Bridge Corporation*, 59 F. 2d 48 (5th Cir.), *rehearing denied*, 59 F. 2d 1065, *cert. denied* 287 U.S. 644; as to ports: *Commissioner of Internal Revenue* v. *Ten Eyck*, 76 F. 2d 515 (2d Cir.); *In re Application of the Mayor, etc. of the City of New York*, 135 N.Y. 253; as to airports: *Hesse* v. *Rath*, 249 N.Y. 436; *People* v. *Wood*, 391 Ill. 237.

Act, as a "body politic and corporate".[5] That section further provides:

> "The Authority is hereby constituted *a public instrumentality and the exercise by the Authority of the powers conferred by this act shall be deemed and held to be the performance of an essential governmental function*" (Italics supplied).

Section 17 of the Act exempted from taxation any project or property acquired or used by the Authority, together with its bonds and the income therefrom, because

> "[t]he exercise of the powers granted by this act will be in all respects *for the benefit of the people of the commonwealth,* for the increase of their commerce and prosperity, for the improvement of their health and living conditions, and as the operation and maintenance of the projects by the Authority will constitute the performance of *essential governmental functions*" (Italics supplied).

And Section 27 of the Act declared that the Act was "necessary for the welfare of the commonwealth and its inhabitants".

The governmental character of the Authority, which the General Court has thus expressed in unmistakable terms, was fully recognized in the *Opinion of the Justices,* 334 Mass. 721, as appears from the excerpt from that opinion set out in Appendix B of the Petition (Pet. 13a-15a). To

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[5] The phrase indicates a sovereign, or some division or entity thereof, exercising governmental functions. See, *e.g.*, *Munn* v. *Illinois*, 94 U.S. 113, 124; *In re Merriam's Estate*, 141 N.Y. 479, 483-484; *People* v. *Snyder*, 279 Ill. 435, 439-441; and *Ulrich* v. *Kolesan*, 132 Ohio St. 115, 118.

that excerpt should be added the following sentence (334 Mass. at 735), summarizing the Justices' view as to the nature of the Authority:

> "We regard the Authority as a purely public corporation for public purposes—*an arm of the State*—analogous to a municipal corporation" (Italics supplied).[6]

Petitioner's claim that the Authority's activities are neither directed nor supervised by the Commonwealth flies in the face of the express terms of the Enabling Act and of judicial decisions. "The authority is required to operate and maintain the airport (§ 5) and the other public 'projects' under its control, and it must enlarge and improve them (§§ 3[q], 8[c], as amended)." *Massachusetts Port Authority* v. *Clerk of East Boston District Court*, Mass. Adv. Sh. (1966) 171, 177, 214 N.E. 2d 23, 27. In carrying out that statutory obligation, the Authority possesses no "roving commission" to act as it pleases. See *Opinion of the Justices*, 330 Mass. 713, 725; *Appleton* v. *Massachusetts Parking Authority*, 340 Mass. 303, 310; *Gould* v. *Greylock Reservation Commission*, Mass. Adv.

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[6] The Supreme Judicial Court has repeatedly affirmed that authorities created under statutes substantially similar in language to the Enabling Act are governmental instrumentalities. See, *e.g.*, *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 329 Mass. 243, 248 ("an agency of government"); *City of New Bedford* v. *New Bedford, etc. Steamship Authority*, 336 Mass. 651, 656 ("a governmental instrumentality to accomplish a public undertaking"); *Massachusetts Turnpike Authority* v. *Commonwealth*, 347 Mass. 524, 529 (land held "in a governmental rather than in a proprietary capacity"); *Gardner* v. *Massachusetts Turnpike Authority*, 347 Mass. 552, 562 ("an agency of State government"); *Village on the Hill, Inc.* v. *Massachusetts Turnpike Authority*, 348 Mass. 107, 118 ("governmental in character" performing "its essential 'governmental function'"); *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 542 ("agency of the sovereign").

Sh. (1966) 431, 432, 215 N.E. 2d 114, 123. As was said in *Massachusetts Bay Transportation Authority* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 545, 549:

> "The obligation to act reasonably in accordance with the statutory purpose and in a manner consistent with the public interest will be implied so far as not expressed. . . . If the Authority acts illegally, that is, in violation of the statute, officials or other persons having standing may act to invoke judicial review."

While the Authority is not "subject to the supervision or regulation of the Department of Public Works or any other department, commission, board, bureau or agency of the Commonwealth *except to the extent and in the manner provided by this act*" (§ 2) (italics supplied),[7] the Act provides for such supervision and regulation in many respects. The Authority is under both legislative and executive control. Thus, the Act contemplates that the Authority may be abolished and its functions and powers transferred to some other "board, body or commission" (§ 1(b)); and the Act itself is "freely revocable and amendable" by the legislature. *Opinion of the Justices*, 334 Mass. 721, 735, 738. Members of the Authority are appointed and subject to removal by the governor (§ 2). The Authority's rules and regulations shall not "conflict with the rules and regulations of any state or federal regulatory body having jurisdiction over the operation of aircraft" (§ 3(q)). Before taking private property by eminent domain the Authority "shall give security to the [State] treasurer, in such amount and such form as may be determined by the department of public works" (§ 3(k)). It

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[7] The italicized phrase is omitted in the quotation from the Act appearing on page 11 of the Petition.

may not sell properties acquired from the Commonwealth without the prior approval of the governor, and the proceeds of any such sale shall be paid to the treasurer of the Commonwealth (§ 4). Its power to order the removal or relocation of surface tracks, conduits, wires, poles or other property cannot be exercised with respect to facilities under the control of the Department of Public Works or the Metropolitan District Commission, or installed under licenses or permits granted by that Department or Commission, except with the approval of that Department or Commission (§ 4). It may not use land of the Commonwealth except with the prior approval of the governor and council (§ 4). It must appoint a financial advisor, whose appointment is subject to approval by the governor (§ 12). It must make an annual report of its activities both to the governor and to the legislature, setting forth "a complete operating and financial statement covering its operations during the year" (§ 21). Its employees are required to be members of the state retirement system (§ 22). It is required to pay amounts due for group insurance at such time and in such manner as the State Employees Group Insurance Commission may prescribe (§ 21). Employee grievances and disputes are subject to arbitration by the State Board of Arbitration and Conciliation, in the absence of arbitration agreements in collective bargaining agreements (§ 24). It is subject (§ 24) to the statutory provisions with respect to employment of persons in the construction of public works (G.L. c. 149, §§ 26, 27A-D), and with respect to competitive bidding on such construction (G.L. c. 149, §§ 44A-D). When all its capital obligations have been paid or provided for "all projects then under the control of the Authority shall be operated and maintained in such manner as may be provided by the general court" (§ 25). Being an agency of the state, its activities were subject to the general investigation by the Massachu-

setts Crime Commission. *Gardner* v. *Massachusetts Turnpike Authority*, 347 Mass. 552, 556, 562.

Since 1959, the Legislature has exercised its power to direct and control the Authority by imposing upon it new obligations and subjecting it to new restrictions. See, *e.g.*, St. 1960, c. 473 (requiring the installation of sound barriers at certain points at Logan and the designation of a so-called run up area for use during particular hours); St. 1961, c. 384 (providing for an annual audit of the Authority's books and accounts by the State Auditor); St. 1963, c. 410 and St. 1964, c. 383 (restricting the Authority's exercise of the power of eminent domain in certain areas adjacent to Logan and prohibiting certain uses of land within the boundaries of the airport which had been intended for the conduct of fixed base operations); and St. 1964, c. 730, § 1 (subjecting the Authority to the provisions of the so-called Open Meeting Law, G.L. c. 30A, § 11).[8]

That the Authority may sue and be sued in its own name in no way establishes that its action is not governmental. In *Parker* v. *Brown*, 317 U.S. 341 and other cases cited above, *supra* p. 5, fn. 2, in which official action of various officers, boards and agencies was held not subject to the Sherman Act, the officer, board or agency in question was suable, and, indeed, actually sued, in his or its own name. As the court below correctly pointed out (Pet. 7a), the issue is not one of immunity from suit, but whether the Sherman Act applies to the action in question. The issue is one of liability, not suability. Absence of liability does not rest

[8] For another example of legislative control of the operations of an Authority, see *City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 336 Mass. 651, and *Opinion of the Justices*, 334 Mass. 765, upholding the validity of St. 1956, c. 747, which required the Steamship Authority to provide daily ferry service throughout the year, an obligation not imposed on it by the statute under which it was created (*City of New Bedford* v. *New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 330 Mass. 422).

on any "repeal of the antitrust laws by implication" (Pet. 11, 13). There "is nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature" (*Parker* v. *Brown*, 317 U.S. 341, 350).

The allegation in the amended complaint that "a conspiracy was entered into" between the Authority and Butler Aviation (R. 10-11) does not change the result. The conclusion that the defendants conspired in violation of the Sherman Act is expressly stated to be "Based on the foregoing statements" (R. 16), and the "foregoing statements" make it plain that the alleged "conspiracy" was nothing more than the Authority's own agreement with Butler Company that the latter should be the fixed base operator at Logan. No other "conspiracy" or "combination" is charged. All that is complained of is the arrangement whereby a public instrumentality, in the exercise of a governmental function, selected a person to perform essential tasks which that instrumentality was under a statutory duty to have carried on. The Authority did not become "a participant in *a private* agreement or combination *by others* for restraint of trade" (*Parker* v. *Brown*, 317 U.S. 341, 351-352) (Italics supplied).

The present case thus differs from *Harman* v. *Valley National Bank*, 339 F.2d 564 (9th Cir.), which petitioner mistakenly regards as in direct conflict with the decision below (Pet. 10). In the *Harman* case, neither the State nor any agency or representative thereof was a party defendant. The Court fully recognized that action by the State's Attorney General did not violate the Sherman Act, and that the conduct of the defendant banks in persuading him to take the action they desired was similarly lawful (339 F.2d at 566). But the complaint alleged that the joint effort of the defendant banks to influence the Attorney General "was but one element in a larger, long-continued

effort to restrain and monopolize 'commercial banking in particular and the financial industry in general within the State of Arizona'" (339 F.2d at 566) and that "the object of the general conspiracy was the unreasonable restraint and monopolization of the Arizona money market" (339 F.2d at 567). It was that preexisting, private conspiracy by the banks, which was plainly unlawful, in which the Attorney General allegedly participated and which the court regarded as actionable.

In holding that the Authority's arrangement to have a single fixed base operator at Logan, rather than two or more, was not illegal (Pet. Appendix A, 7a-8a) the court below applied well-settled principles. As the cases cited by the court demonstrate, the owner of a terminal may lawfully grant exclusive privileges with respect to the transportation of passengers or freight or the transaction of business or solicitation of customers thereon.[9]

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[9] In addition to the cases cited by the court below, see *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 527; *Delaware, Lackawanna and Western Railroad* v. *Morristown*, 276 U.S. 182, 194; *In Re Third Avenue Transit Corporation*, 233 F. 2d 310, 312 (2d Cir.); *Skaggs* v. *Kansas City Terminal Ry. Co.*, 233 Fed. 827 (W.D. Mo.); and cases collected in Annotation, 15 A.L.R. 356. The same principle is applicable to public airports (see, *e.g.*, *Harrison County Court* v. *West Virginia Air Service*, 132 W. Va. 1, 9 (fixed base operation); *Miami Beach Airline Service, Inc.* v. *Crandon*, 159 Fla. 504, 507-510; *Rocky Mountain Motor Co.* v. *Airport Transit Co.*, 124 Colo. 147, 158-159; *People ex rel Adamowski* v. *Daley*, 22 Ill. App. 2d 87, 92.

It is equally clear in the commercial field that an exclusive distributorship does not offend the antitrust laws. See, *e.g.*, *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F. 2d 283 (6th Cir.), *cert. den.* 375 U.S. 922, *rehearing denied*, 375 U.S. 982; *Schwing Motor Company* v. *Hudson Sales Corporation*, 138 F. Supp. 899 (D. Md.), *aff'd* 239 F. 2d 176 (4th Cir.), *cert. den.* 355 U.S. 823; *Packard Motor Car Company* v. *Webster Motor Car Company*, 243 F. 2d 418 (D.C. Cir.), *cert. den.*, 355 U.S. 830; *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387, 398-399 (S.D.N.Y.) *aff'd* 321 U.S. 707, 719; *Savon Gas Stations Number Six, Inc.* v. *Shell Oil Company*, 309 F. 2d 306 (4th Cir.). *Cf. Susser* v. *Carvel Corporation*, 332 F. 2d 505, 516-517 (2d Cir.), *cert. dismissed*, 381 U.S. 125.

The cases of *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 and *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817, on which petitioner relies (Pet. 15), are not to the contrary. In *Poller*, it was claimed that Columbia Broadcasting, a competitor of plaintiff, conspired with third persons to eliminate plaintiff from the market in order to acquire his UHF station for itself at depressed prices and to destroy the entire UHF industry (368 U.S. at 469). Similarly in *Gamco*, the exclusion of plaintiff from the market was effected by its competitors, desirous of protecting their own local market, a classic Section 2 case of a monopolist exercising his power to exclude a business rival. There is no such claim here. The Authority was not in competition with Wiggins, nor engaged in business at all; it had no motive or purpose to acquire Wiggins' business or to restrain or monopolize fixed base operations at Logan or elsewhere. In selecting Butler rather than Wiggins to furnish vital fixed base services, it neither sought nor gained anything for itself.

The decision below in no way conflicts with Section 308(a) of the Federal Aviation Act or the 1965 Policy Statement of the Federal Aviation Agency, to which petitioner refers (Pet. 8-9, 10, 11). Neither that Act nor the Policy Statement purports to make exclusive arrangements illegal; they merely establish a condition on the expenditure of Federal funds. If Congress had intended to make the grant of exclusive rights an offense, it would scarcely have limited that offense to arrangements at federally-supported airports. Indeed, the Act implicitly recognizes that exclusive arrangements do not in themselves violate the law. For if a grant of exclusive rights were unlawful as a violation of the anti-trust laws, there would have been no occasion for a specific provision against giving Federal

funds to an airport where such an illegal arrangement existed.

The Policy Statement itself (30 F.R. 13661) indicates that the present situation at Logan Airport complies with the requirements of the Act. The lease to Butler-Boston was entered into in September, 1961 (R. 14). In July 1962, the Federal Aviation Agency first issued a Policy Statement with respect to Exclusive Rights on Airports Receiving Federal Funds. 27 F.R. 7054. In that Statement it discussed the situation at Logan Airport, of which petitioner complains in this case,[10] and stated that "the Adminstrator accepted the offer by the airport to enter into arrangements with at least one more fixed-base operator, which arrangements were subsequently negotiated successfully" (27 F.R. 7054). Under those arrangements, as the Complaint shows, the Authority extended Van Dusen's lease and Van Dusen has continued as a fixed-base operator at Logan (Pet. 6; R. 14, 15-16). Thus, an exclusive fixed-base operation at Logan never was, and is not now, in effect. Moreover, the Agency's 1965 Policy Statement (30 F.R. 13662) makes it clear that prior to the publication of its July 17, 1962 Statement "exclusive rights to conduct certain activities not involving the actual use of public landing areas were not considered to be in violation of the statute"; and it declares that the existence of an exclusive agreement made prior to that date (as was the lease to Butler-Boston) does not preclude the continued expenditure of Federal funds, provided the agreement is terminated at the earliest renewal or cancellation date.

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[10] The Policy Statement does not mention Logan Airport by name but refers to "Case A" which "involved a large Eastern airport". A comparison of the Agency's description with the allegations of the petitioner's amended complaint in this action makes it manifest that the both are dealing with the same situation.

Conclusion

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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